In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1479

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES TREASURY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are a Japanese corporation which manufactures television sets for sale in Japan and for export to the United States, and a United States corporation which imports and sells such television sets in the United States.

In 1968, the Treasury Department instituted an industry-wide proceeding to investigate whether television sets imported from Japan are being, or are likely to be, sold at less than fair value ("LTFV") within the meaning of the Antidumping Act (33 Fed. Reg. 8851). In December 1970, the Treasury Department determined that they were being so sold. It so advised the United States Tariff Commission (19 C.F.R. 153.38), which after notice and hearing determined that the

domestic industry is being, or is likely to be, injured by reason of such importation (Pet. 4-5; 36 Fed. Reg. 4576-4578). The Secretary of the Treasury made a "dumping" finding—that is, he found that television receiving sets, monochrome and color, from Japan are being, or are likely to be, sold at less than fair market value (Pet. 4-5; 19 C.F.R. 153.40; 36 Fed. Reg. 4597; 35 Fed. Reg. 18549; 19 C.F.R. 153.35). Accordingly, they are subject to duties known as "dumping" duties, under the Anti-dumping Act. However, no such duties have as yet been levied.

After making that finding, the Treasury Department investigated on an individual basis the foreign market value of particular makes and models of Japanese television receivers during specified time periods, in order to appraise the imported sets on an entry-by-entry basis (19 U.S.C. 161(a)). The foreign market value of the petitioning Japanese corporation's television sets was only recently determined, and an entry appraisement is now in process (Pet. 5).

2. In July 1971, shortly after the Treasury Department made its "dumping" finding, petitioners instituted this action in the Customs Court, seeking a mandatory injunction and declaratory relief invalidating and vacating the finding on the ground that the proceedings leading to it had denied petitioners due process. Customs Court jurisdiction was invoked under the All Writs Act, 28 U.S.C. 1651 (Pet. 6-7).

The Customs Court dismissed the petition, holding that the suit was premature, and that the court lacked equitable jurisdiction to issue the requested relief under the All Writs Act (Pet. App. 7a-19a). The Court of Customs and Patent Appeals affirmed, for the reasons given by the Customs Court (Pet. App. 3a-5a).

3. The decision of the Court of Customs and Patent Appeals is correct and no issue warranting further review is presented.

The petition in the Customs Court was premature. Under the statutory scheme, Customs Court jurisdiction attaches only after a protest against the decision of the appropriate Customs officer has been filed with and denied by the Secretary of the Treasury. 28 U.S.C. 1582. Here, no protest has been filed; in fact no dumping duty has been levied against petitioners. As the Customs Court noted (Pet. App. 16a):

> [T]he situation here * * * [is that] dumping duties may, or may not, be assessed, and where if assessed, someone, not necessarily the present plaintiffs, may protest the assessment and bring an action in this court.

The action is thus not ripe for review by the Customs Court, and was properly dismissed on that ground. *J. C. Penney Co.* v. *United States Treasury Dept.*, 439 F. 2d 63, 68 (C.A. 2), certiorari denied, 404 U.S. 869.

Furthermore, petitioners' suit was barred under Section 7421 of the Internal Revenue Code of 1954, 26 U.S.C. 7421, which prohibits suits to restrain the assessment or collection of any tax. This provision has been held to bar suits to enjoin the assessment of customs duties. *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); cf. *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (D. D.C.), affirmed, 352 U.S. 921. Petitioners cannot escape the bar of this statute on the ground that they are seeking declaratory relief, since the declaratory judgment statute does not apply to federal tax controversies. 28 U.S.C. 2201.

Finally, the Customs Court could not grant the relief requested. The petition sought to vacate the determina-

tions of the Treasury Department and of the United States Tariff Commission. The Customs Court, however, cannot grant equitable relief. *Eurasia Import Co., Inc.* v. *United States,* 31 CCPA 202, 211, C.A.D. 273; *Carl Matusek Shipping Co., Inc.* v. *United States,* 51 Cust. Ct. 8, C.D. 2406; *Cummins-Collins Distilleries* v. *United States,* 20 Cust. Ct. 93, C.D. 1090, affirmed, 36 CCPA 88, C.A.D. 403; *Julius C. Wolff, Inc.* v. *United States,* 58 Treas. Dec. 404, T.D. 44310. Petitioners' reliance in that court on the All Writs Act, 28 U.S.C. 1651, does not confer the necessary authority, since that Act is not an independent grant of jurisdiction. See, *e.g., Benson* v. *State Board of Parole & Probation,* 384 F. 2d 238, 239 (C.A. 9), certiorari denied, 391 U.S. 954; *Stafford* v. *Superior Court of California,* 272 F. 2d 407, 409 (C.A. 9), certiorari denied, 362 U.S. 979; *In re Previn,* 204 F. 2d 417, 418 (C.A. 1); 9 Moore, *Federal Practice,* para. 110.26, p. 282 (2d ed., 1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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